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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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12 UNITED STATES OF AMERICA,

NO. CR. 89-62 WBS GGH

13 Plaintiff,

ORDER

14 v.

15 MICHAEL L. MONTALVO,

16 Defendant.  
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19 A jury convicted Michael L. Montalvo of engaging in a  
20 continuing criminal enterprise ("CCE"), 21 U.S.C. § 848, and the  
21 court sentenced him to life imprisonment. Defendant subsequently  
22 brought a motion to vacate, set aside, or correct his sentence  
23 pursuant to 28 U.S.C. § 2255. The court denied his motion, and  
24 the court of appeals affirmed. Defendant then sought relief from  
25 that judgment pursuant to Federal Rule of Civil Procedure 60(b),  
26 and the court denied his motion, as well as two subsequent  
27 motions for reconsideration. Defendant now moves once more for  
28

1 reconsideration of the denial of his Rule 60(b) motion.<sup>1</sup>

2 I. Factual and Procedural Background

3 In Richardson v. United States, the Supreme Court held  
4 that in order to find a defendant guilty under the CCE statute,  
5 the jury "must unanimously agree not only that the defendant  
6 committed some 'continuing series of violations[,] but also that  
7 the defendant committed each of the individual 'violations'  
8 necessary to make up that 'continuing series.'" 526 U.S. 813,  
9 815 (1999). Since defendant was convicted before the Court  
10 decided Richardson, the jury did not receive the instruction that  
11 Richardson now requires. (See United States v. Montalvo, No.  
12 89-062, Mag. Judge's Findings & Recs. 36, adopted in full, Docket  
13 No. 889 (E.D. Cal. July 11, 2001).)

14 Defendant subsequently brought a motion to vacate, set  
15 aside, or correct his sentence pursuant to 28 U.S.C. § 2255.  
16 (Id. at 1-2.) This court found that while the failure to  
17 instruct the jury pursuant to Richardson was not harmless error,  
18 defendant's claim was precluded by the anti-retroactivity  
19 principle of Teague v. Lange, 489 U.S. 288 (1989). (See id. at  
20 39-40.) Defendant then filed an appeal challenging the court's  
21 conclusion that Richardson was not retroactive; the government  
22 opposed the appeal, but did not file a cross-appeal addressing  
23 the harmless-error issue. (Def.'s Mot. for Relief (Docket No.  
24 1050) at 2; see Pl.'s Mot. to Dismiss (Docket No. 1052) at 3-4.)

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26 <sup>1</sup> Defendant has described the instant motion as a  
27 "Request for Judicial Notice of Phelps v. Alameida[,] No[.] 07-  
28 15167 (9th Cir. June 25, 2009) that Overrules Order of Denial on  
November 17, 2008, and Authorizes This Motion for Relief from  
that Order by Fed. R. Civ. P[.] 60(b)(6)."

1 The court of appeals affirmed this court's order, but on  
2 different grounds; it found that Richardson applied  
3 retroactively, but the failure to give the instruction to the  
4 jury was harmless error. United States v. Montalvo, 331 F.3d  
5 1052, 1059 (9th Cir. 2003) (per curiam).

6 Defendant subsequently brought a motion for relief from  
7 final judgment pursuant to Rule 60(b) of the Federal Rules of  
8 Civil Procedure. In that motion, defendant cited Greenlaw v.  
9 United States, 128 S. Ct. 2559 (2008), to argue, inter alia, that  
10 due to the government's failure to file a cross-appeal, the court  
11 of appeals was without jurisdiction to determine whether the  
12 Richardson-error was harmless. Therefore, defendant argued, the  
13 judgement of the court of appeals was "void" under Rule 60(b)(4).  
14 Defendant reiterated the same or substantially similar arguments  
15 under Rule 60(b)(5) and (6).

16 In an Order issued on November 17, 2008, this court  
17 denied defendant's motion; as to defendant's argument pursuant to  
18 Rule 60(b)(4), the court specifically held that it had "no  
19 jurisdiction to review orders of the [c]ourt of [a]ppeals" and to  
20 adjudge them "void." United States v. Montalvo, No. 97-2015,  
21 2008 WL 4937624, at \*1 (E.D. Cal. Nov. 17, 2008) (citing In re  
22 Sasson, 424 F.3d 864, 876 (9th Cir. 2005); Peterson v. Brooks,  
23 No. 07-2442, 2008 WL 4072700, at \*4 (E.D. Pa. Aug. 29, 2008)).  
24 The court subsequently denied two motions for reconsideration  
25 filed by defendant, as well as his request for a certificate of  
26 appealability.

27 Presently before the court is defendant's motion for  
28 reconsideration of the court's November 17, 2008 Order in light

1 of Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009).

2 II. Discussion

3 In Phelps, the Ninth Circuit clarified the "analytical  
4 approach[] to Rule 60(b)(6) motions." Id. at 1134-35.

5 Previously, Ninth Circuit precedent instructed that Rule 60(b)(6)  
6 could never provide relief due to subsequent changes in governing  
7 law. See Tomlin v. McDaniel, 865 F.2d 209, 210 (9th Cir. 1989)  
8 (affirming the denial of a Rule 60(b)(6) motion because "the  
9 judgment [at issue] . . . became final before the laws changed").

10 Phelps, however, recognized that this per se rule was  
11 inconsistent with the Supreme Court's decision in Gonzalez v.  
12 Crosby, 545 U.S. 524 (2005), which "did not hold that denial of  
13 the motion was required because it rested on a subsequent change  
14 in the law." 569 F.3d at 1132. Instead, the Supreme Court  
15 affirmed the denial of a Rule 60(b)(6) motion because it "did not  
16 exhibit the 'extraordinary circumstances' required to grant Rule  
17 60(b)(6) relief." Id. Because the analyses of Tomlin and  
18 Gonzalez were thus "clearly irreconcilable," the Ninth Circuit in  
19 Phelps concluded that "Tomlin's per se approach has been  
20 overruled" and that a "'case by case inquiry' is required." Id.  
21 at 1133-34.

22 Defendant's reliance on Phelps appears to be two-fold.  
23 First, defendant appears to contend that Phelps is itself an  
24 intervening change in the governing law and, under its own  
25 holding, should direct the court to revisit its November 17, 2008  
26 Order. In other words, defendant argues that Phelps is an  
27 intervening change in the law that governs intervening changes in  
28 the governing law. Second, defendant contends that since Phelps

1 implicitly contemplates that district courts can re-open cases  
2 that have been previously adjudicated by appellate courts if  
3 there is an intervening change in the law, this court's  
4 conclusion that it had "no jurisdiction to review orders of the  
5 [c]ourt of [a]ppeals" was erroneous. Montalvo, 2008 WL 4937624,  
6 at \*1.

7 First, while Phelps clearly signals a change in the law  
8 of the Ninth Circuit, Tomlin's per se analysis did not factor  
9 into this court's November 17, 2008 Order. As that Order  
10 recounts, defendant's prior claim under Rule 60(b)(6) simply  
11 reiterated his contention that the judgment of the court of  
12 appeals was void pursuant to Rule 60(b)(4). See id. at \*2.  
13 Therefore, while Phelps indeed modifies the application of Rule  
14 60(b)(6) in certain respects, this court did not have occasion to  
15 apply Rule 60(b)(6) in a manner implicated by Phelps's holding.

16 Nonetheless, the instant motion indicates that the  
17 court was not sufficiently indulgent when it considered  
18 defendant's previous argument under Rule 60(b)(6). Although  
19 defendant did not expressly state that he sought relief under  
20 Rule 60(b)(6) due to an intervening change in the law, that  
21 argument was reasonably apparent from the tenor of his motion.  
22 Furthermore, while the court remains skeptical as to its power to  
23 declare a ruling of the court of appeals "void" under Rule  
24 60(b)(4) for lack of jurisdiction,<sup>2</sup> defendant correctly notes  
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26 <sup>2</sup> Even if this court could declare that a ruling by the  
27 Ninth Circuit was void for lack of jurisdiction, Greenlaw does  
28 not provide a basis for doing so. In that case, the Supreme  
Court expressly declined to determine whether the cross-appeal  
rule is jurisdictional in nature. See 128 S. Ct. at 2565

1 that Phelps contemplates that district courts may grant relief  
 2 from a final judgment under Rule 60(b)(6) where an appellate  
 3 court's ruling in a case has been subsequently abrogated. See  
 4 Phelps, 569 F.3d at 1128-29, 1141-42 (reversing the district  
 5 court for failing to grant the petitioner's Rule 60(b)(6) motion,  
 6 which would have effectively reversed the Ninth Circuit's  
 7 previous determination that the petition was untimely).

8 Despite having reconsidered this aspect of the November  
 9 17, 2008 Order, the court nonetheless concludes that Rule  
 10 60(b)(6) does not provide defendant the relief he seeks because  
 11 the intervening authority he cites--Greenlaw v. United States,  
 12 128 S. Ct. 2559 (2008)--does not change the governing law in his  
 13 case.

14 In Greenlaw, the district court imposed a sentence on  
 15 the defendant of 442 months. 128 S. Ct. at 2562-63. The  
 16 defendant appealed, contending that his sentence should have been  
 17 no longer than 180 months. Id. Although the government did not  
 18 file a cross-appeal, the court of appeals increased the

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 20 ("Following the approach taken in Neztsosie, we again need not  
 21 type the rule 'jurisdictional' in order to decide this case.").  
 22 Accordingly, the governing law in the Ninth Circuit continues to  
 23 provide that "a protective or cross-appeal is only the 'proper  
 24 procedure,' not a jurisdictional prerequisite once an initial  
 25 appeal has been filed." Mendocino Envtl. Ctr. v. Mendocino  
 26 County, 192 F.3d 1283, 1298 (9th Cir. 1999) (quoting Bryant v.  
 27 Technical Research Co., 654 F.2d 1337, 1341-42 (9th Cir. 1981));  
 28 see Snider v. Sherman, No. 03-6605, 2007 WL 1174441, at \*17 (E.D.  
 Cal. Apr. 19, 2007) (Wanger, J.) ("[A] notice of cross-appeal is  
 a rule of practice that can be waived at the court's discretion,  
 rather than a jurisdictional requirement." (citing Mendocino  
County, 192 F.3d at 1298)); see also Stephanie-Cardona LLC v.  
Smith's Food & Drug Ctrs., Inc., 476 F.3d 701, 705 (9th Cir.  
 2007) ("[A] late notice of cross-appeal is not fatal because the  
 court's jurisdiction over the cross-appeal derives from the  
 initial notice of appeal.").

1 defendant's sentence to 622 months because the district court  
2 erroneously imposed a ten-year consecutive sentence instead of a  
3 twenty-five year consecutive sentence. Id. at 2563-64. After  
4 granting certiorari, the Supreme Court vacated the judgement of  
5 the court of appeals under the cross-appeal rule, which instructs  
6 that "an appellate court may not alter a judgment to benefit a  
7 nonappealing party." Id. at 2565.

8           Unlike Greenlaw, the court of appeals in this case did  
9 not "alter" this court's judgment "to the benefit" of the  
10 government. In Greenlaw, the judgment of the court of appeals  
11 effectively increased the defendant's sentence and therefore  
12 increased the benefit redounding to the government; here,  
13 however, the judgment of the court of appeals provided the  
14 government with the identical benefit it received from the  
15 judgment of this court, namely, the denial of defendant's  
16 petition for habeas corpus. As the Ninth Circuit has explained:

17           So long as the appellee does not seek to "enlarge" the  
18 rights it obtained under the district court judgment, or  
19 to "lessen" the rights the appellant obtained under that  
judgment, appellee need not cross-appeal in order to  
present arguments supporting the judgment.


20           Thus, if the district court enters a judgment that  
21 denies all relief to a plaintiff, and the plaintiff  
appeals from that judgment, a defendant-appellee seeking  
22 to uphold the judgment need not cross-appeal and may urge  
affirmance on any ground appearing in the record. If the  
23 court of appeals agrees with the plaintiff-appellant and  
alters the judgment in some way, it provides relief that  
24 was not provided by the district court, and thereby  
"enlarges" the rights of the plaintiff-appellant and  
25 "lessens" the rights of the defendant-appellee. But if  
the court of appeals agrees with the defendant-appellee  
26 and sustains the judgment, it only affirms what the  
district court did. Even if it affirms on the  
27 alternative ground, its decision leaves the parties where  
the district court left them. In that event, the court  
28 of appeals does not "enlarge" the rights of the  
defendant-appellee or "lessen" the rights of the  
plaintiff-appellant.

1 Francisco Jose Rivero v. City & County of San Francisco, 316 F.3d  
2 857, 862 (9th Cir. 2002) (citations omitted). In light of this  
3 explication of the cross-appeal rule, it is plain that the court  
4 of appeals was not precluded from affirming this court's denial  
5 of defendant's § 2255 motion on alternative grounds.

6 Accordingly, although the Ninth Circuit's recent  
7 decision in Phelps v. Alameida, 569 F.3d 1120 (9th Cir. 2009),  
8 has led the court to question part of the analysis in its  
9 November 17, 2008 Order, the court will nonetheless deny  
10 defendant's motion for reconsideration because Greenlaw v. United  
11 States, 128 S. Ct. 2559 (2008), does not present an intervening  
12 change in the law governing defendant's case.

13 IT IS THEREFORE ORDERED that defendant's motion for  
14 reconsideration be, and the same hereby is, DENIED.

15 DATED: August 20, 2009

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18 WILLIAM B. SHUBB  
19 UNITED STATES DISTRICT JUDGE  
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